

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

MARY ANN DUREAU,  
Plaintiff,

v.

MARK HOWARD ALLENBAUGH  
Defendant.

**CASE NO. 2:15-cv-01494-BRO-JEM**  
**JUDGMENT**

PURSUANT TO THE ORDER GRANTING PLAINTIFF’S MOTION FOR  
DEFAULT JUDGMENT, IN PART, IT IS ORDERED THAT JUDGMENT be  
entered in favor of Mary Ann Dureau (“Plaintiff”) against Mark Howard  
Allenbaugh (“Defendant”) in the amount of: \$60,709.00, plus prejudgment interest  
and post judgment costs.

## FINDINGS OF FACT

1  
2 1. Plaintiff is a citizen and resident of California. (Compl. ¶ 2.) In  
3 January 2012, the City of Banning filed suit against Plaintiff and other parties,  
4 alleging violations of the federal Comprehensive Environmental Response,  
5 Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 *et seq.*, in  
6 connection with a hazardous waste spill. *See City of Banning v. Mary Ann Dureau,*  
7 *et al.*, No. CV 12-00043-BRO (SPx) (“Banning Case”); (Compl. ¶ 4). This Court  
8 presided over the matter. The case proceeded to a bench trial, and on November  
9 26, 2013, the Court entered judgment against Plaintiff in the amount of  
10 \$592,665.00. (Compl. ¶ 5, Ex. 1.) On December 17, 2013, Plaintiff timely  
11 appealed the decision to the United States Court of Appeals for the Ninth Circuit.  
12 (Compl. ¶ 6.) On December 20, 2013, Defendant became Plaintiff’s attorney of  
13 record. (Compl. ¶ 7.)

14  
15  
16  
17  
18  
19 2. Defendant is an attorney and a citizen and resident of Ohio. (Compl.  
20 ¶ 2.) He is not admitted to practice law in the State of California. (Compl. ¶ 7.)  
21 On September 15, 2014, in connection with a matter unrelated to this one, the  
22 United States Court of Appeals for the Fourth Circuit fined and suspended  
23 Defendant for two years for failing to diligently represent his client and failing to  
24 respond to the court’s orders. (Compl., Ex. 2.)  
25  
26  
27  
28

1           3.     Plaintiff initiated this action on February 28, 2015, (Dkt. No. 1),  
2 bringing claims against Defendant for malpractice and breach of the parties' legal  
3 services fee agreement, (Compl. ¶¶ 11–21). Plaintiff served Defendant on April 8,  
4 2015. (Dkt. No. 11.) Despite receiving notice of the claims against him,  
5 Defendant has not responded to the Complaint or otherwise appeared in this action.  
6 On May 19, 2015, the Clerk entered default against Defendant. (Dkt. No. 15.)  
7 Plaintiff then filed her first Motion for Default Judgment, seeking damages of  
8 \$628,306.34 for the malpractice claim and \$65,709.00 for the breach of contract  
9 claim. (Dkt. No. 17.) The Court denied Plaintiff's Motion without prejudice,  
10 holding that although some of the *Eitel* factors weighed in Plaintiff's favor,  
11 Plaintiff ultimately "failed to make the requisite showings as to liability and  
12 damages" to warrant a default judgment. (Order Den. Pl.'s First Mot. for Default  
13 J. ("First Order") (Dkt. No. 22) at 7.) Specifically, the Court identified  
14 discrepancies between Plaintiff's declarations and exhibits proving the amount of  
15 payments to Defendant, concluded that Plaintiff failed to demonstrate she would  
16 have prevailed on her appeal, and acknowledged a potential double recovery issue.  
17 (See First Order 4–7.) The Court invited Plaintiff to file a renewed motion for  
18 default judgment to cure the first motion's deficiencies. (First Order at 7.)

19           4.     Plaintiff subsequently filed a second Motion for Default Judgment on  
20 August 31, 2015, again seeking \$694,015.34 in damages from Defendant for the  
21

1 same malpractice and breach of contract claims. (Dkt. No. 24.) The Motion was  
2 accompanied by declarations of J. Curtis Edmondson, (Dkt. No. 26), Dick  
3 Swenson, (Dkt. No. 27), and Mary Ann Dureau (Plaintiff), (Dkt. No. 28). On  
4 September 28, 2015, Plaintiff also filed a motion to refer the default judgment to a  
5 jury. (Dkt. No. 32.)  
6  
7

8 5. On October 23, 2015, the Court denied Plaintiff's second Motion for  
9 Default Judgment. (Dkt. No. 35.) Specifically, the Court noted the same  
10 discrepancies regarding the amount Plaintiff paid Defendant in legal fees, (Order  
11 Den. Pl.'s Second Mot. for Default J. ("Second Order") at 14–15), and held that  
12 despite new arguments that her Ninth Circuit appeal would have prevailed but for  
13 Defendant's negligence, Plaintiff still failed to establish the causation element of  
14 her malpractice claim, (Second Order at 9–13). The Court also denied Plaintiff's  
15 request to refer to the factual matters to a jury, concluding that "[e]ven assuming  
16 the Court would permit a jury to decide the factual issues, the Court would still  
17 decide the legal issue as to whether its prior decision finding Plaintiff liable for the  
18 oil spill in *City of Banning v. Dureau*, No. CV 12-00043-BRO (SPx), represented  
19 clear error." (Second Order at 7.) The Court also distinguished the one case  
20 Plaintiff cited in support of her request—*Barber v. Turberville*, 218 F.2d 34 (D.C.  
21 Cir. 1954)—and noted that the case was only persuasive authority. (*Id.*)  
22  
23  
24  
25  
26  
27  
28

1           6.     On December 8, 2015, Plaintiff filed her third Motion for Default  
2 Judgment. (Dkt. No. 37.) Accompanying Plaintiff's Motion were declarations of  
3  
4 Dick Swenson, (Dkt. No. 39), Goldy Berger, (Dkt. No. 40), Joseph Curtis  
5 Edmondson, (Dkt. No. 41), and Mary Ann Dureau, (Dkt. No. 42).

6  
7           7.     The Court took judicial notice of the following three documents: (1)  
8 the Third Amended Complaint filed in *City of Banning v. Dureau*, No. CV 12-  
9 00043-BRO (SPx), 2013 WL 6063344 (C.D. Cal. Nov. 18, 2013); (2) the trial  
10 testimony transcripts from *City of Banning v. Dureau*, 2013 WL 6063344; and, (3)  
11 this Court's findings of fact and conclusions of law in *City of Banning v. Dureau*,  
12 2013 WL 6063344. (*See* Dkt. No. 38.)  
13  
14

### 15                                   **CONCLUSIONS OF LAW**

16           8.     On a motion for default judgment, all factual allegations relating to  
17 liability are deemed true, but allegations regarding the amount of damages are not.  
18  
19 *See TeleVideoSys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987); *see*  
20 also *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (“The general  
21 rule of law is that upon default the factual allegations of the complaint, except  
22 those relating to the amount of damages, will be taken as true.”).

23  
24           9.     Plaintiff's request for default judgment complies with Rule 55 and  
25  
26 Local Rule 55-1.  
27  
28

1           **A.     NEGLIGENCE CLAIM**

2           10. To prove a claim of negligence, the Plaintiff must establish “(1) the  
3 duty of the professional to use such skill, prudence, and diligence as other  
4 members of the profession commonly possess and exercise; (2) breach of that duty;  
5 (3) a causal connection between the negligent conduct and the resulting injury; and  
6 (4) actual loss or damage resulting from the professional negligence.” *Giacometti*  
7  
8 *v. Aulla, LLC*, 187 Cal. App. 4th 1133, 1137 (Cal. Ct. App. 2010).  
9

10           11. Plaintiff fails to establish the causation element because, even  
11 assuming Defendant filed Plaintiff’s opening brief, the Ninth Circuit would not  
12 have reversed this Court’s decision in the *Banning* Case.  
13

14           12. Accordingly, Plaintiff’s Motion for Default Judgment as to the  
15 \$628,306.34 in damages is DENIED.  
16

17           **B.     CONTRACT CLAIM**

18           13. Plaintiff’s Motion for Default Judgment in the amount of \$60,709.00  
19 is GRANTED, as Plaintiff sufficiently accounts for that amount.  
20

21           **C.     JURY TRIAL DEMAND**

22           14. Plaintiff’s request to refer the factual issues to a jury is DENIED.  
23

24       ///

25       ///

26       ///  
27  
28

1 **IT IS THEREFORE ORDERED:**

2 Plaintiff Mary Ann Dureau shall take from Defendant Mark Howard  
3 Allenbaugh a sum of: \$60,709.00, plus the following: prejudgment interest from  
4 the date of last payment to Defendant; a Bill of Costs according to L.R. 54-3; and  
5 contractual attorneys' fees pursuant to the attorney-client fee agreement according  
6 to L.R. 55-3.  
7  
8

9  
10 IT IS SO ORDERED.

11 DATED: April 22, 2016



HON. BEVERLY REID O'CONNELL  
United States District Judge